

July 26, 2017

The Honorable Jocelyn Boyd  
Chief Clerk and Administrator  
Public Service Commission of South Carolina  
101 Executive Center Drive  
Columbia, South Carolina 29201

**Re:** Friends of the Earth and Sierra Club, Complainant/Petitioner v. South Carolina  
Electric & Gas Company, Defendant/Respondent  
Docket No. 2017-207-E

Dear Ms. Boyd:

Attached for filing please find SCE&G's Reply to the Response in Opposition to  
SCE&G's Motion to Dismiss for the matter cited above.

If you have any questions regarding these matters, please do not hesitate to contact me.

Sincerely,

**WOMBLE CARLYLE SANDRIDGE & RICE**  
*A Limited Liability Partnership*

  
Belton T. Zeigler  
Partner

cc: Shannon Bowyer Hudson, Esq.  
Jeffrey M. Nelson, Esq.  
Robert Guild, Esq.  
J. Blanding Holman, IV, Esq.  
K. Chad Burgess, Esq.  
Matthew Gissendanner, Esq.

STATE OF SOUTH CAROLINA

## (Caption of Case)

Friends of the Earth and Sierra Club,  
Complainant / Petitioner v. South Carolina  
Electric & Gas Company,  
Defendant / Respondent

BEFORE THE  
PUBLIC SERVICE COMMISSION  
OF SOUTH CAROLINA

## COVER SHEET

DOCKET

NUMBER: 2017 - 207 - E

(Please type or print)

Submitted by: Belton T. ZeiglerSC Bar Number: 5754Address: 1221 Main Street, Suite 1600Telephone: 803-454-7720Columbia, SC 29201

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## DOCKETING INFORMATION (Check all that apply)

☐ Emergency Relief demanded in petition☐ Request for item to be placed on Commission's Agenda expeditiously☐ Other: \_\_\_\_\_

INDUSTRY (Check one)	NATURE OF ACTION (Check all that apply)			
<input checked="" type="checkbox"/> Electric	<input type="checkbox"/> Affidavit	<input type="checkbox"/> Letter	<input type="checkbox"/> Request	
<input type="checkbox"/> Electric/Gas	<input type="checkbox"/> Agreement	<input type="checkbox"/> Memorandum	<input type="checkbox"/> Request for Certification	
<input type="checkbox"/> Electric/Telecommunications	<input type="checkbox"/> Answer	<input type="checkbox"/> Motion	<input type="checkbox"/> Request for Investigation	
<input type="checkbox"/> Electric/Water	<input type="checkbox"/> Appellate Review	<input type="checkbox"/> Objection	<input type="checkbox"/> Resale Agreement	
<input type="checkbox"/> Electric/Water/Telecom.	<input type="checkbox"/> Application	<input type="checkbox"/> Petition	<input type="checkbox"/> Resale Amendment	
<input type="checkbox"/> Electric/Water/Sewer	<input type="checkbox"/> Brief	<input type="checkbox"/> Petition for Reconsideration	<input type="checkbox"/> Reservation Letter	
<input type="checkbox"/> Gas	<input type="checkbox"/> Certificate	<input type="checkbox"/> Petition for Rulemaking	<input checked="" type="checkbox"/> Response	
<input type="checkbox"/> Railroad	<input type="checkbox"/> Comments	<input type="checkbox"/> Petition for Rule to Show Cause	<input type="checkbox"/> Response to Discovery	
<input type="checkbox"/> Sewer	<input type="checkbox"/> Complaint	<input type="checkbox"/> Petition to Intervene	<input type="checkbox"/> Return to Petition	
<input type="checkbox"/> Telecommunications	<input type="checkbox"/> Consent Order	<input type="checkbox"/> Petition to Intervene Out of Time	<input type="checkbox"/> Stipulation	
<input type="checkbox"/> Transportation	<input type="checkbox"/> Discovery	<input type="checkbox"/> Prefiled Testimony	<input type="checkbox"/> Subpoena	
<input type="checkbox"/> Water	<input type="checkbox"/> Exhibit	<input type="checkbox"/> Promotion	<input type="checkbox"/> Tariff	
<input type="checkbox"/> Water/Sewer	<input type="checkbox"/> Expedited Consideration	<input type="checkbox"/> Proposed Order	<input type="checkbox"/> Other: _____	
<input type="checkbox"/> Administrative Matter	<input type="checkbox"/> Interconnection Agreement	<input type="checkbox"/> Protest		
<input type="checkbox"/> Other: _____	<input type="checkbox"/> Interconnection Amendment	<input type="checkbox"/> Publisher's Affidavit		
	<input type="checkbox"/> Late-Filed Exhibit	<input type="checkbox"/> Report		

Print Form

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**BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA  
DOCKET NO. 2017-207-E**

**IN RE:**

Friends of the Earth and Sierra Club,	)	SCE&G'S REPLY TO THE RESPONSE IN
Complainant/Petitioner v. South Carolina	)	OPPOSITION TO SCE&G'S MOTION
Electric & Gas Company,	)	TO DISMISS
Defendant/Respondent	)	
<hr/>	)	

South Carolina Electric and Gas ("SCE&G") hereby replies to the Friends of the Earth's and the Sierra Club's (the "Complainants") Response in Opposition to SCE&G's Motion to Dismiss ("Response"). In their Response, Complainants make sweeping generalizations that if the Commission was to dismiss Complainants' Petition/Complaint, Complainants would be without recourse, and the Commission would be "powerless to effectively regulate this utility...." Response at 3. Such a statement mischaracterizes both the law and SCE&G's arguments made in its Motion to Dismiss.

As stated in the Motion to Dismiss, a full opportunity to evaluate the prudence of the project will be available to Complainants when SCE&G files for Commission review of proposed adjustments in its construction plans or BLRA approved costs, just as the Base Load Review Act provides. Allowing the present docket to continue when said filing will occur before the close of the quarter will result in duplicative testimony and wasted Commission time, especially considering, as explained in the Motion to Dismiss, that the relief sought is improper. *See, e.g.,* Order No. 2009-496 (July 17, 2009) (the Commission exercised "its discretion for purposes of judicial economy" and dismissed case.); Order No. 2007-764 (Nov. 19, 2007) (dismissing Complaint because issues were repetitive and a "waste of economic and judicial resources").

Complainants also make two novel arguments in their Response. First, Complainants argue that their Complaint is an appropriate means of seeking relief from judgment pursuant to Rule 60(b), SCRCF, for “mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud, misrepresentation, or other misconduct of an adverse party.” Response at 4. Complainants also argue that their Complaint is appropriate because a “fraud on the court” “provide[s] an independent basis for relief from a final judgment.” *Id.*

Complainants did not raise either of these arguments in their Complaint. Rather, in their Complaint, Complainants sought (1) a cease and desist order; (2) determination of the prudence of acts and omission by SCE&G; (3) for the Commission to review and determine the prudence of abandonment; (4) for the Commission to review and determine the prudence of the available least cost efficiency and renewable energy alternatives to the Project for meeting the energy needs of ratepayers; and (5) for the Commission to remedy, abate and provide reparations to ratepayers to address the unjust and unreasonable rates charge to ratepayers. Complaint at 7-8. Complainants cannot use their response to plead a cause of action for the first time. Should Complainants seek to amend the relief they are seeking, they should do so in a manner that is procedurally proper.

Regardless, even if the allegations were allowed, the statements in the Response are not sufficiently pled. Complainants do not point to any specific judgment from which they seek relief. Likewise, Complainants do not identify any “mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud, misrepresentation, or other misconduct” on which to base an argument for relief from the pleadings. In fact, Complainants admit they do not know of any, stating that they seek to use their pending discovery to formulate a basis for these

allegations. Response at 4. The pleading rules require allegations of fraud or mistake to be pled with specificity. *See* Rule 9(b), SCRCPP; *see also* *Chewning v. Ford Motor Co.*, 354 S.C. 72, 86, 579 S.E.2d 605, 613 (2003) (“[a]gain, any claim of fraud upon the court must be accompanied by particularized allegations.”)

For the Sierra Club and Friends of the Earth accuse a party and its counsel of fraud on the court (see Response at p. 4) is no small matter: “Fraud upon the court is a “serious allegation ... involving ‘corruption of the judicial process itself.’” *Chewning v. Ford Motor Co.*, 354 S.C. at 78, 579 S.E.2d at 608; *quoting* *Cleveland Demolition Co., Inc. v. Azcon Scrap Corp*, 827 F.2d 984, 986 (4<sup>th</sup> Cir. 1987); *quoting in turn*, *In re Whitney-Forbes*, 770 F.2d 692, 698 (7th Cir.1985). Fraud upon the court requires a showing of “intent to deceive” and “conscious wrongdoing” typically by an attorney as officer of the court. *Chewning v. Ford Motor Co.*, 354 S.C. at 78, 579 S.E.2d at 608.

*Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated will constitute fraud on the court.*


*Chewning v. Ford Motor Co.*, 354 S.C. 72, 78, 579 S.E.2d 605, 608 (2003) *quoting* *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir.1978); *accord*, *Ray v. Ray*, 374 S.C. 79, 83, 647 S.E.2d 237, 239 (2007).

For the Sierra Club and Friends of the Earth allege fraud on the court in this matter without citing any evidence to support this allegation is improper and unwarranted. The Commission should strike the Response filed by the Sierra Club and Friends of the Earth for this reason.

Therefore, Complainants' Response does not provide any meritorious reason for the Complaint not to be dismissed.

For the reasons set forth above, the Commission should strike the Response, dismiss the Complaint/Petition in this matter, which in any event, will become moot when SCE&G files its petition for review and approval of its plans for the Units in light of the Westinghouse bankruptcy. SCE&G also renews its request, made in earlier filings, that the Commission suspend the schedule for pre-filing testimony in this docket and all discovery in this matter, and issue a revised pre-filing schedule if one is needed after this motion has been decided.

Respectfully submitted,

  
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Attorneys for South Carolina Electric & Gas  
Company

Cayce, South Carolina  
July 26, 2017

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THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA  
DOCKET NO. 2017-207-E**

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Friends of the Earth and Sierra Club, )  
Complainant/Petitioner v. South Carolina )  
Electric & Gas Company, )  
Defendant/Respondent )

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**CERTIFICATE OF SERVICE**

This is to certify that I have caused to be served this day one copy of SCE&G's Motion to Dismiss Complaint/Petition of Friends of the Earth and Sierra Club to the persons named below at the addresses set forth via U.S. First Class Mail and electronic mail:

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Columbia, South Carolina  
July 26, 2017